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UNITED STATES BANKRUPTCY COURT
DISTRICT OF CONNECTICUT

In re:	CASE NO. 2-88-01124
ASTROLINE COMMUNICATIONS COMPANY LIMITED PARTNERSHIP,	CHAPTER 7
Debtor.	
MARTIN W. HOFFMAN, Trustee	
Plaintiff,	
vs.	
RICHARD P. RAMIREZ; WHCT MANAGEMENT, INC., THOMAS A. HART, JR.; ASTROLINE COMPANY; ASTROLINE COMPANY, INC.; HERBERT A. SOSTEK; FRED J. BOLING, JR.; RICHARD H. GIBBS; RANDALL L. GIBBS; CAROLYN H. GIBBS, RICHARD GOLDSTEIN, EDWARD A. SAXE AND ALAN TOBIN, AS CO-EXECUTORS OF THE ESTATE OF JOEL A. GIBBS; ROBERT ROSE and MARTHA GIBBS ROSE,	ADV. PROC. NO. 93-2220 (RLK)
Defendants.	JULY 14, 1995

PLAINTIFF'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

INTRODUCTION

Martin W. Hoffman, Trustee of Astroline Communications Company Limited Partnership ("Trustee") submits these post-trial

Proposed Findings of Fact and Conclusions of Law. The central (and dispositive) factual issue at trial is whether the defendant Astroline Company exercised sufficient control over Astroline Communications Company Limited Partnership ("ACCLP" or the "Debtor"), such that it acted substantially the same as a general partner. As documented below, the evidence at trial demonstrated beyond question that Astroline Company exercised complete control over the Debtor's financial operations and cash and, in so doing, it, its general partners and its successor, Astroline Company, Inc., became liable under Section 723 of the Bankruptcy Code for the deficiency of property of the estate available to pay the claims of creditors.

PROPOSED FINDINGS OF FACT

1. ACCLP is a Massachusetts limited partnership that was formed on May 29, 1984, to "acquire, own and operate" a television station known as WHCT-TV, Channel 18 in Hartford, Connecticut (Trial Transcript, Vol. 3 at 71; Joint Exhibit 165). ("T. Vol. __ at __; Ex. ___").

2. At the time ACCLP was formed, WHCT-TV was owned by Faith Center, Inc. ("FCI"), but FCI's license to operate the television station had been scheduled for review at a license revocation hearing before the Federal Communications Commission ("FCC"). (T. Vol. 3 at 62; Ex. 2).

3. In September, 1983, FCI had agreed to sell the station to Interstate Media Corporation ("IMC"), a corporation controlled by Joseph Jones, pursuant to the minority distress sale policy of the FCC. That policy allowed the owner of a television station whose license was subject to revocation to transfer the license only to a qualified minority applicant but at a discount from fair market value. (T. Vol. 1 at 22-25). See Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990). The sale to IMC had been approved by the FCC, provided the transaction were consummated on or before May 16, 1984, the day on which FCI's license revocation hearing was scheduled. (T. Vol. 3 at 62, 63; Ex. 328).

4. In April, 1984, Thomas A. Hart, Jr. ("Hart"), a Washington, D.C. attorney (and also a defendant in this action), had contacted Fred J. Boling, Jr. ("Boling") and informed him that

Channel 18 was for sale pursuant to the FCC minority distress sale policy. (T. Vol. 3 at 61-62). At the time, Hart represented Astroline Company, a Massachusetts partnership, whose partners were defendants Herbert A. Sostek ("Sostek"), Boling, Randall L. Gibbs, Richard A. Gibbs and Joel A. Gibbs. (T. Vol. 3 at 61, Ex. 150).

5. On April 27, 1984, Hart had provided financial materials regarding WHCT-TV to Sostek and reminded Sostek that time was "of the essence" because the license revocation hearing had been scheduled for May 16, 1984. (T. Vol. 3 at 64-65; Ex. 1). Once a revocation hearing commenced, the licensee would lose its right to participate in the minority distress program. (T. Vol. 1 at 26-27). Boling understood that IMC could only acquire the license under the minority preference rules of the FCC and was told by Hart that Jones was a qualified minority applicant. (T. Vol. 3 at 63). From April 27, 1984 through mid-May, Astroline Company, through Sostek and Boling, negotiated with Jones regarding its possible financing of IMC's acquisition of WHCT-TV. (T. Vol. 3 at 66, 67). Astroline Company and IMC failed to reach an agreement.

6. On or about May 14, 1984, Hart (at Astroline Company's direction) advised FCI, for the first time, that Astroline Company was interested in negotiating directly with FCI to purchase WHCT-TV. (T. Vol. 3 at 66, 70; Ex. 2, 328). Hart had made it clear to Boling that to obtain an extension of the hearing date it was necessary to demonstrate to the FCC that a sale was underway. (T. Vol. 3 at 65, 69). Boling recognized, therefore, that Astroline Company was under extreme time pressure to execute an agreement to purchase the television license from FCI before the license revocation hearing started. Hart, on behalf of Astroline Company, persuaded the FCC to postpone the revocation hearing for two weeks to May 30, 1984. (T. Vol. 3 at 69, 71). The revocation hearing was extended in order to allow Astroline Company to find a member of a qualified minority group to become a partner with it. (T. Vol. 3 at 71).

7. Negotiations between Astroline Company and FCI continued through May 29, 1984, when ACCLP signed the Purchase and Sale Agreement with FCI. (Ex. 5). Although it is unclear precisely when FCI signed the agreement, it had been signed by FCI before May 29, 1984. (T. Vol. 1 at 75; Vol. 3 at 74-75; Ex. 5). FCI

had, therefore, agreed to sell the television station and license to a yet to be formed entity in which the Astroline Company partners were to be involved, directly or indirectly. In fact, Section 22 of the agreement provides that any notices to be sent to the buyer be directed to "Fred J. Boling, Astroline Company, 855 Broadway, P.O. Box 989, Saugus, MA 01906." (Ex. 5). There was no evidence at trial that this notice provision was ever modified.

8. Boling knew that Astroline Company could not purchase the FCI license without having a partner that was a qualified minority applicant under the FCC guidelines. (T. Vol. 3 at 71). Hart suggested Richard Ramirez; no Astroline Company partner had ever heard of Ramirez or met him. (T. Vol. 1 at 9; T. Vol. 3 at 68). Ramirez was, however, Hispanic and could be used to qualify the purchasing entity as a minority applicant under the FCC distress sale policy. (T. Vol. 1 at 22). Ramirez had graduated from Boston College in 1976 with a bachelor's degree in management. Except for approximately a one year period, Ramirez had worked only for radio stations. All of his experience had been in sales. (T. Vol. 1 at 32-41; Ex. 4). Prior to May, 1984,

Ramirez had never been the general manager of a radio or television station nor had he been in charge of any business. (T. Vol. 1 at 43; Ex. 4). It was not until sometime during Memorial Day weekend, May 26-28, 1984, that the Astroline Company partners first met Ramirez. (T. Vol. 1 at 5-14; Vol. 3 at 71). After just two hours of discussion, Ramirez was excused for about 45 minutes. When he returned, Astroline Company offered him a partnership interest. (T. Vol. 1 at 58-59).

9. ACCLP and WHCT Management, Inc. ("WHCT Management") were both formed on May 29, 1984, the same day on which ACCLP signed the agreement to purchase Channel 18 from FCI. (See Exhibits 5, 6, 19, 165). The partners of Astroline Company had initially preferred that the entity created to acquire the television license be a corporation in order to insulate them from liability, but were advised by Hart that compliance with the FCC minority distress policy would be easier if, instead, they used the limited partnership form. (T. Vol. 3 at 75; Vol. 5 at 6-7). As Boling explained, the FCC guidelines required that the qualified minority group member in a corporate structure hold a greater ownership percentage than in a partnership structure. (T. Vol. 5 at 7).

10. The ACCLP partnership agreement listed the partners and their respective ownership interests as follows: Richard Ramirez, the sole individual general partner, held a 21% interest; WHCT-TV Management, a general partner, held 9%; and Astroline Company, purportedly the limited partner, held the remaining 70%. At its inception, Astroline Company owned 100% of the WHCT Management stock, but in February, 1986 transferred its shares to Šostek, Boling and the three Gibbs brothers. (Ex. 19). The ACCLP partnership agreement recites that Ramirez made an initial capital contribution of just $210 for his 21% in ACCLP. Ramirez never made any other contributions. (T. Vol. 1 at 48; Ex. 9). Astroline Company made an initial equity contribution of $440,616 and further contributions over time in excess of $25,000,000. (Ex. 9). The partners of Astroline Company never expected Ramirez to contribute any money to ACCLP. (T. Vol. 1 at 48-49, T. Vol. 3 at 76). As Ramirez acknowledged, ACCLP's finances were principally the responsibility of Astroline Company. (T. Vol. 1 at 92).

11. Astroline Company was formed in 1981 for the purpose of making investments in a broad array of businesses and industries,

most of which included "Astroline" in their name. (T. Vol. 3 at 21-23, 44-45; Ex. 150). The partners of Astroline Company had each received cash distributions on the liquidation of Gibbs Oil Company, a wholesale petroleum business, principally owned by the Gibbs' family, where Sostek, Boling and the three Gibbs brothers had been employed for many years. (T. Vol. 3 at 9-10, 18-22; T. Vol. 5 at 142). Boling had been the officer with overall responsibility for the financial affairs of Gibbs Oil and Sostek was its President. (T. Vol. 3 at 12-17).

12. Astroline Company initially had four general partners: Sostek, Boling, Richard Gibbs and Joel Gibbs. (T. Vol. 3 at 5-7, 34-35; Ex. 150). Although there was a factual dispute at trial, the evidence demonstrated that Randall Gibbs, initially a limited partner of Astroline Company, became a general partner sometime in 1983, before ACCLP was formed. (T. Vol. 3 at 35-36; April 21, 1995 Transcript at 102, 103 ("T. 4/21/95 at ___)). The 1983, 1984 and all subsequent United States Partnership Tax Returns of Astroline Company in evidence, each signed under oath and subject to penalty of perjury, show Randall Gibbs as a general partner. (Ex. 53). Randall Gibbs, although present in the courtroom

throughout the trial, did not testify as to the date on which he became a general partner of Astroline Company. A negative inference can be, and has been, drawn from his failure to testify.

13. The partners of Astroline Company made investment decisions based in large part upon input and guidance provided by Sostek and Boling. (T. Vol. 3 at 46-48). Moreover, although there were five partners, Boling was principally responsible for all of Astroline Company's financial matters; (T. Vol. 5 at 149-50); and was designated as the tax matters partner on the partnership tax returns. (T. Vol. 3 at 33-34; Ex. 53). Boling administered Astroline Company's financial affairs with the help of two employees of Astroline Company, Richard Sullivan and Peter Siciliano. (T. Vol. 3 at 94-95, 145; T. Vol. 5 at 9-10, 16, 18-19, 150). Sullivan had responsibility for cash and bank accounts and Siciliano managed accounts payable and receivable. (T. Vol. 3 at 121-22; Vol. 3 at 9-20). Each had staff working for them to perform these functions. (T. Vol. 5 at 150).

14. Prior to the creation of ACCLP, the single largest investment made by Astroline Company in any one business was $1,000,000. (T. Vol. 3 at 50-51). Boling testified at trial that, consistent with its prior investments, he and the other partners of Astroline Company initially had no expectation that Astroline Company's investment in ACCLP would exceed that amount. (T. Vol. 3 at 51). The Astroline Company partners anticipated at the outset of the venture that all additional funds necessary to build and operate the television station would be provided by third-parties. (T. Vol. 3 at 52). In May, 1984, the partners of Astroline Company expected that total capital of $15,000,000 would be necessary for the television station to achieve a break-even operating level. (T. Vol. 1 at 68-79, T. Vol. 3 at 52). Astroline Company also expected that prior to reaching profitability ACCLP would generate significant losses that would create tax benefits to be passed through to the partners of Astroline Company. (T. Vol. 3 at 27-28).

15. Ultimately, Astroline Company's efforts to obtain the required capital, equity or debt, from banks, financial institutions or venture capital funds for ACCLP failed; (T. Vol. 1 at 124-26;

T. Vol. 3 at 78-79); and the Astroline Company partners considered abandoning the venture. Instead, Astroline Company chose to continue to fund ACCLP's operations and capital needs itself, as it had done since ACCLP's inception. (T. Vol. 1 at 134-37; T. Vol. 3 at 81).

16. Consistent with its decision to fund the capital requirements itself, Astroline Company caused the terms of the ACCLP partnership agreement to be modified such that Astroline Company significantly increased its share of the equity and secured more of the valuable tax benefits for its partners. A further result of the amendment was that, notwithstanding the FCC minority preference guidelines, Ramirez no longer owned 21% of the partnership's equity. (T. Vol. 1 at 138-62; Ex. 9, 54). Rather than retaining 21% of the equity which he held under the initial partnership agreement, Ramirez was given the right only to receive 21% of all partnership distributions after Astroline Company had been repaid its equity contributions in full, with a return. (T. Vol. 1 at 162; Ex. 9). Ramirez's interest, which had been reflected as 21% on the 1984 ACCLP tax return, was shown to have

been reduced to below 1% on the 1985, 1986 and 1987 tax returns. (Ex. 10-13).

17. Boling testified at trial that Astroline Company created and administered a comprehensive "cash control system" to deal with the Debtor's funds. (T. Vol. 5 at 103-05). Sullivan was responsible for managing ACCLP's cash. The cash control system covered all receipts and disbursements of the Debtor from its inception until August 31, 1988, when Astroline Company decided to case investing in the Debtor. (T. Vol. 4 at 65; T. Vol. 5 at 16, 20, 126). One of Sullivan's principal purposes was to reduce interest expense to the Astroline Company partners who personally were borrowing money from a bank to invest in the Debtor through Astroline Company. Boling admitted that that particular feature of the cash control system was established for the personal benefit of the Astroline Company partners. (T. Vol. 5 at 105). The Debtor never borrowed any money until certain equity contributions were "reversed" and "reclassified" and had no responsibility for payment or reimbursement of interest expense incurred by the Astroline Company partners. (Ex. 24). There was

no evidence at trial that the cash control system conferred any benefit on the Debtor. (T. Vol. 5 at 8-20, 103-05).

18. It was undisputed at trial that at no time during the four years of the Debtor's operations prior to the bankruptcy filing was there a checkbook in the Hartford, Connecticut offices of ACCLP for any of its accounts. (T. Vol. 1 at 193-95; T. 4/21/95 at 141, 166, 185). All ACCLP bank statements were reconciled by Astroline Company staff in Boston. (T. Vol. 7 at 54-55). It is significant that Boling rejected Ramirez's requests that the Debtor be allowed to maintain its checkbooks in its own office in Hartford. (T. Vol. 1 at 236-37).

19. To control the disbursement of ACCLP's cash, Astroline Company imposed an intricate payables system. (T. Vol. 1 at 172-173; Ex. 87, 152). By denying the Debtor possession of its checkbooks, Astroline Company was able to maintain complete control over the Debtor's cash. In order for ACCLP to obtain a check to pay any bill (or even for petty cash) it had to submit proper documentation to the Astroline Company office in Massachusetts where, if the documentation were satisfactory,

an Astroline Company partner or employee would approve the bill for payment, authorize a check to be drawn and send it to ACCLP. (T. Vol. 1 at 176, 195, 240, T. Vol. 3 at 106; Ex. 136, 137). Every invoice received by ACCLP in Hartford was sent to Astroline Company's office along with a transmittal memorandum, backup documentation and, in most circumstances, a check request. (T. Vol. 7 at 42-44, 61; Ex. 39, 210). Ramirez acknowledged that ACCLP could not obtain a check from Astroline Company's office in Massachusetts without submitting the proper documentation; as Ramirez put it, ACCLP "had to dot all the I's and cross the T's" in order to get a check. (T. Vol. 1 at 240). Astroline Company demanded that its procedures be followed, notwithstanding the facts that: ACCLP had a fully functional office in Hartford, at least from the beginning of 1985; (T. Vol. 3 at 142; T. Vol. 7 at 61-62); and, thereafter, had a sophisticated computer system specifically designed to accomplish automatically the functions performed by Astroline Company.

20. It is undisputed that every one of the "thousands" of checks drawn on the Debtor's account prior to August 31, 1988 were prepared in Astroline Company's office in Massachusetts by its

employees. (T. Vol. 7 at 15; T. 4/21/95 at 140; Ex. 212). The system, "preferred" by Boling, was cumbersome and expensive. Even ACCLP's auditors, Arthur Anderson, formally recommended that it be changed. (T. Vol. 1 at 233-37; Ex. 55, p. 10). As a May 30, 1986 Andersen memorandum states: "...accounts payable are being paid through a related party [identified as Astroline Company by Ramirez (T. Vol. 1 at 234-35)] ... consideration should be given to moving the accounts payable function to Hartford." (Ex. 55, p. 10). In fact, Ramirez admitted that, by the beginning of 1986, ACCLP had sufficient staff and capability through the Columbine computer accounting system to handle the payable and check writing functions. (T. Vol. 1 at 183). That these functions continued to be performed by Astroline Company personnel in Massachusetts is persuasive evidence of Astroline Company's control over the Debtor.

21. Boling admitted at trial that he wrote "O.K." on hundreds of check requests, transmittal forms and invoices; (T. Vol. 3 at 110-139; Ex. 39, 39 A-H, 216); and Ramirez acknowledged that if Boling did not approve the payment of an invoice, the Astroline Company personnel that worked for him would not have

drawn the check. (T. Vol. 1 at 202, Ex. 35, 39). As Ramirez explained:

> Q. And if he [Boling] didn't say okay, they wouldn't have drawn the check, would they?
>
> A. In all likelihood, they would not have.
>
> Q. And if they didn't draw the check, you couldn't pay the bill?
>
> A. In all likelihood, I couldn't. (T. Vol. 1 at 202).

Boling also admitted that it was the practice, at least in 1984 and 1985, that either he or Sostek "initial" all invoices of ACCLP before they were paid; (T. Vol. 3 at 158); and also acknowledged that there were instances where rather than writing "O.K." on an invoice he wrote "No" or "Hold". (T. 116-127; Ex. 130). Boling's testimony that he was merely recording Ramirez's directions is not credible. (T. Vol. 3 at 137-38). Moreover, although Sostek, who was present at the trial, chose not to testify, the evidence also established that he approved the payment of invoices. (T. Vol. 3 at 133; Ex. 39I, Ex. 141-148). It is clear that no check to pay any ACCLP obligation would (or could) have been written if

Astroline Company did not consent. Indeed, Sullivan would not transfer funds into the ACCLP account until Astroline Company approved a check for payment. (T. Vol. 3 at 88, 159-63; T. Vol. 7 at 51).

22. Although the bank accounts in Massachusetts into which the Debtor's revenues were swept, and from which the Debtor's bills were paid and payroll was funded, were in the name of ACCLP, the monthly account statements and the checks only listed the address of ACCLP as Saugus, Massachusetts and then later as Reading, Massachusetts, the two locations of the Astroline Company office. (T. Vol. 1 at 192, T. Vol. 3 at 43, 44; Exs. 32, 33, 42, 46, 212). This is persuasive evidence of control in light of the undisputed testimony that ACCLP maintained its office in Hartford.

23. In addition to its total control of ACCLP's disbursements, Astroline Company also completely controlled the Debtor's income and other cash. At Astroline Company's insistence, all operating revenues received by ACCLP were deposited in a lock box account at Bank of Boston Connecticut, which had a twice-weekly sweep feature that automatically

transferred all funds to a bank account at State Street Bank in Massachusetts. (T. Vol. 1 at 187-189; T. Vol. 7 at 36, 56-58; Ex. 22, 55, 129, 47, 48). Although the defendants claimed at trial that Ramirez had "access" to the Debtor's funds because he had authority to sign checks, it was undisputed that prior to August 31, 1988, Ramirez never had a checkbook in Hartford and could not obtain a check to draw on an ACCLP checking account unless someone in the Astroline Company office in Massachusetts chose to give him one. (T. Vol. 1 at 202). Further, Ramirez had no access to the Debtor's revenues, all of which were deposited in the lockbox account from which they were swept to Boston. (T. Vol. 7 at 56-60).

24. Even if Ramirez had "access" to ACCLP's funds, what is significant (and undisputed) is that certain general partners of Astroline Company (Sostek, Boling, Richard Gibbs and Joel Gibbs) each had individual signature authority on the ACCLP bank accounts at State Street Bank and Security National Bank in Massachusetts and, therefore, always had unchecked authority to withdraw the Debtor's funds without the Debtor's knowledge or consent. (T. Vol. 1 at 220-21, 225-26; T. Vol. 3 at 90, 93, 98-101; T. 4/21/95

at 185; Exs. 20, 21, 212, 215, 216). Ramirez admitted with respect to the Debtor's State Street Bank account:

> Q. Okay. But four other people had control of the account?
>
> A. That's true.
>
> Q. Okay. And they could have taken the money out any time they wanted?
>
> A. They never did, but they could have.

(T. Vol. 1 at 238).

Contrary to Ramirez' belief, however, the evidence at trial was that partners of Astroline Company did sign at least two checks on the Debtor's account, payable to Astroline Company for "interest" without the knowledge or consent of Ramirez. (T. 4/21/95 at 179-180; T. Vol. 7 at 34-35; Ex. 216A, 216B). Ramirez testified about those checks as follows:

> Q. Okay. So you don't know why Joel Gibbs wrote a check to the Astroline Company on April 10th, 1985 for $20,071, do you?

A. No.

Q. And you don't know why Mr. Boling wrote a check to the Astroline Company for interest on February 6th, 1985 in the amount of $5,352, do you?

A. No, I do not.

(T. 4/21/95 at 179-80).

The defendants offered no evidence at trial to explain why Boling and Gibbs wrote checks for "interest" to Astroline Company without Ramirez's knowledge.

25. The evidence also established numerous other instances when ACCLP checks were signed by the partners of Astroline Company. (Ex. 212, 215, 216). Although the testimony was that many of these checks had been requested by personnel in the Hartford office of ACCLP and approved by Ramirez, (and prepared by Astroline Company personnel in Massachusetts) certain checks, in addition to those payable to Astroline Company, were prepared by Astroline Company with no involvement by ACCLP employees or Ramirez. An example was one check payable to Dr. Gene Scott of

FCI for $100,000 that Boling (who signed the check) could not explain at trial. (T. Vol. 3 at 147-48; Ex. 212).

26. In addition to control of the revenue and expenses of ACCLP, Astroline Company also was substantially involved in other aspects of financial reporting and planning. Financial projections for the business were prepared by ACCLP's accountants for review by Boling and Sostek. (Ex. 61, 63). Drafts of annual financial statements and tax returns were prepared by ACCLP's accountants and submitted to Boling for his review and input. (Ex. 68, 84, 118). Ramirez and Rozanski regularly submitted revenue and expense projections for ACCLP to Sostek and Boling for their review and approval. (T. Vol. 7 at 68; Ex. 69, 70, 112, 113, 116, 117, 120, 121). The financial reporting requirements imposed by Astroline Company on ACCLP were so rigorous that at one point Ramirez apologized to Sostek and Boling for the poor quality and frequency of ACCLP's financial reporting. (T. Vol. 2 at 29-33; Ex. 78).

27. Astroline Company also manipulated ACCLP's financial reporting and tax treatment of certain transactions for the

personal benefit of its partners which further evidenced the substantial degree of control imposed by the putative limited partner over the business of the Debtor. (T. Vol. 6 at 94). It was established at trial that equity contributions of $4,000,000 made by Astroline Company during 1987 were "reclassified" as debt in January, 1988. (T. Vol. 2 at 62-66; T. Vol. 7 at 75-79; Ex. 24). Boling testified that he prepared a Promissory Note, drove to Hartford and demanded that Ramirez sign the note in favor of Astroline Company. (T. Vol. 5 at 55; Ex. 23, 144). Although the "reclassification" was shown on the 1987 audited statements of ACCLP, the 1987 monthly internal statements never showed the $4,000,000 debt. (Ex. 15, 205). I find that the reclassification was authorized by Ramirez at the express direction of Boling and is further demonstration of the control of Astroline Company over the Debtor's business. (T. Vol. 2 at 65).

28. Six months later, in May, 1988, the promissory note was secured by a mortgage on real property owned by ACCLP, again at Boling's direction and insistence. (T. Vol. 2 at 82-85; Ex. 154). Significantly, ACCLP had unsuccessfully sought to obtain a secured loan of $5.5 million in November, 1987, presumably to pay the

Astroline Company "loan" that, incidentally, was still classified as equity on the October 1987 financial statement. (T. Vol. 3 at 82-86; Ex. 153, 205). Again in September, 1988, just two months before the bankruptcy filing, Astroline Company required that ACCLP sign a Revolving Loan Agreement, this time purporting to evidence a $2,930,000 loan, all of which had been advanced to ACCLP prior to the date the loan agreement was signed. (T. Vol. 5 at 78-83; Ex. 31, 155).

29. In addition to maintenance of complete dominion and control over the cash and the financial operations of ACCLP, Astroline Company exerted control over other aspects of ACCLP's business. Numerous correspondence from the Debtor's professional firms were addressed exclusively or copied to Boling and/or Sostek. (Ex. 60, 62, 65, 90, 93, 94). Ramirez sought Boling's and Sostek's approval for certain construction modifications at ACCLP's Garden Street facility and made recommendations to Boling. (T. Vol. 2 at 40-47; T. 4/21/95 at 180-81; Ex. 82, 83). Ramirez also sought Sostek's and Boling's direction regarding advertising, marketing and programming issues. (Ex. 71, 72, 73, 76, 86, 87, 91, 92, 111, 123, 133).

30. On October 31, 1988, an involuntary bankruptcy petition was filed by certain creditors of ACCLP. On November 2, 1988, two days after the involuntary petition was filed, Astroline Company was purportedly dissolved and all of its assets transferred to Astroline Company, Inc., a Massachusetts corporation of which Sostek, Boling, Richard Gibbs and Randall Gibbs are the officers, directors and shareholders. (T. Vol. 3 at 5, 7-9; Ex. 18). Although Astroline Company was "reconstituted" as Astroline Company, Inc., its business remained precisely the same. The transformation to corporate form was effected to attempt to limit the liabilities of the partners of Astroline Company. (T. Vol. 3 at 138; T. Vol. 5 at 138). At the same time, the Astroline Company partners transferred their shares in WHCT Management to Ramirez for no consideration. (Ex. 19).

31. The Debtor's Chapter 11 case was converted to Chapter 7 on April 9, 1991 and the plaintiff was appointed Interim Trustee on that date. The plaintiff was appointed Permanent Trustee on June 13, 1991. The Trustee commenced this adversary proceeding on June 10, 1993, seeking to recover from the defendants the

deficiency in the property of the Debtor to pay in full the claims of its creditors pursuant to Section 723 of the Bankruptcy code. There is a deficiency in the property of the estate necessary to pay in full the allowed claims of creditors. (T. Vol. 5 at 155). The Trustee is entitled to recover that deficiency from the defendants, jointly and severally. The Trustee, pursuant to the agreement of the parties, shall establish the amount of the deficiency at an evidentiary hearing to be scheduled by the court.

PROPOSED CONCLUSIONS OF LAW

1. Section 723(a) of the Bankruptcy Code provides:

> (a) If there is a deficiency of property of the estate to pay in full all claims which are allowed in a case under this chapter concerning a partnership and with respect to which a general partner of the partnership is personally liable, the trustee shall have a claim against such general partner for the full amount of the deficiency.

2. The Trustee has standing to assert his claims under Section 723 of the Bankruptcy Code. "Congress has in § 723

created a federal cause of action for a Chapter 7 trustee to compel contributions from general partners of insolvent partnership estates." Hoffman v. Ramirez (In re Astroline Communications Co. Ltd. Partnership), 161 B.R. 874, 878-79 (Bankr. D. Conn. 1993). Although Section 723(a) facially applies solely to general partners, Section 723 is the vehicle through which limited partners who act as general partners may be held liable to a Chapter 7 Trustee. Id. at 879; In re Lamb, 36 B.R. 184 (Bankr. E.D. Tenn. 1983); In re Verses, 15 B.R. 48 (Bankr. W.D. Pa. 1981); In re Ridge II, 158 B.R. 1016, 1023-24 (Bankr. C.D. Cal. 1993).

3. In addition to Section 723, Section 544 of the Bankruptcy Code also confers standing on the Trustee to pursue claims against a limited partner whose conduct makes it liable as a general partner under state law. "Even if § 723 were not available . . . the Trustee may rely on the 'strong arm' clause of Bankruptcy Code § 544." In re Astroline, 161 B.R. at 879 & n.5; Transcript of Ruling on Motion for Summary Judgment, October 12, 1994 at pp. 7-8 ("the Trustee has standing to assert a cause of

action either under § 723 or § 544(a)(1)"). See also In re City Communications, Ltd., 105 B.R. 1018, 1021 (Bankr. N.D. Ga. 1989).

4. This adversary proceeding was timely commenced by the Trustee on June 10, 1993. Even if Section 546 of the Bankruptcy Code applies to Section 723 claims (facially it does not), the claim here was timely brought within two years from the June 13, 1993 date on which the plaintiff was appointed Permanent Trustee. Hirsch v. Harper (In re Colonial Realty Co.), 168 B.R. 512, 515-16 (Bankr. D. Conn. 1994); Ruling on Summary Judgment, at p. 13, see also In re Wingspread Corp., 178 B.R. 938, 944-45 (Bankr. S.D.N.Y. 1995).

5. Defendants Carolyn H. Gibbs, Richard Goldstein, Edward A. Saxe and Alan Tobin, as co-executors of the Estate of Joel A. Gibbs (the "Executors"), contend that the Trustee's claims against them are time barred under Mass. Gen. Laws Ch. 197, § 13 (requiring that creditors of a deceased bring claims before the estate is fully administered), and Bankruptcy Code § 108(a) (extending applicable nonbankruptcy statutes of limitation until two years after the order for relief). The Executors' assertions

fail, however, because neither section is applicable to claims brought under Section 723.

6. As it has been interpreted, "§ 723 is equitable in nature. Thus, the only applicable rule of limitations is laches." Silk v. Miller (In re CS Associates), 167 B.R. 368, 369 (E.D. Pa. 1994) (footnotes omitted) (citing Granfinanciera, S.A. v. Nordberg, 492 U.S. 33 (1989)). Because the Executors offered no evidence that the Trustee delayed unreasonably in bringing this action, laches does not bar this action. See Miller v. Spitz (In re CS Associates), 160 B.R. 899, 905 (Bankr. E.D. Pa. 1993) (finding no unreasonable delay even though trustee did not commence action until three years after his appointment), aff'd, 167 B.R. 368 (E.D. Pa. 1994).

7. Moreover, by its express language, "Bankruptcy Code § 108(a) refers to pre-filing causes of action belonging to the Debtor and not to a cause of action created by the Bankruptcy Code." In re Downtown Inv. Club, 89 B.R. at 65; see also Mancuso v. Continental Bank Nat'l Ass'n (In re Topcor, Inc.), 132 B.R. 119, 126 (Bankr. N.D. Tex. 1991); Mahoney, Trocki & Assocs., Inc.

v. Kunzman (In re Mahoney, Trocki & Assocs., Inc.), 111 B.R. 914, 920 & n.6 (Bankr. S.D. Cal. 1990). Section 723 claims, however, arise under the Bankruptcy Code, not under state law, and cannot be asserted by a Debtor prepetition. Andrew v. Coopersmith (In re Downtown Inv. Club III), 89 B.R. 59, 65 (Bankr. 9th Cir. 1988). As such, Section 108(a) is not applicable to the Trustee's claims under Section 723. In re Downtown Inv. Club III, 89 B.R. at 65.

8. Pursuant to the Massachusetts version of the Uniform Limited Partnership Act ("MULPA") Section 19(a), Mass. Gen. Laws Ch. 109, § 19(a), a limited partner losses its limited liability and becomes liable for partnership obligations if it exercises "substantially" the same control over the business as general partners. The complete text of Section 19(a) in effect prior to March 1, 1989 (the undisputed relevant time period here) provides:

> (a) . . . a limited partner is not liable for the obligations of a limited partnership unless he is also a general partner or, in addition to the exercise of his rights and powers as a limited partner, he takes part in the control of the business; provided, however, that if a limited partner's participation in the control of the business is not substantially the same as the exercise of the powers of a general partner, he is liable only to persons who transact

> business with the limited partnership with actual knowledge of his participation in control.

9. This version of the statute does not require any evidence of creditor reliance or deception and none is necessary for Plaintiff to prevail in his claims against Astroline Company, its partners and Astroline Company, Inc. See Bingham v. Goldberg, Merchesano, Kohlman, Inc., 637 A.2d 81, 88 (D.C. App. 1994); Gateway Potato Sales v. G.B. Investment Co., 170 Ariz. 137, 822 P.2d 490 (Ariz. App. 1991).

10. One commentator on the issue of the type of activity by a limited partner sufficient to make it liable as a general partner has stated: "Control over bank accounts is important not only because of the inherent importance of money in most businesses, but also because it is easier to document." 4 Bomberg and Rubstein on Partnership, § 15.14(d) at 15.128 (1994). Although reported decisions are scarce on the issue of the requisite type and level of control is sufficient to make a limited partner liable as a general partner, the central factual focus of each of the cases is control of the partnership's money.

11. Holzman v. DeEscamilla, 86 Cal. App. 2d 858, 195 P.2d 833 (1948), was a suit brought by a bankruptcy trustee against the three partners of the trustee's Debtor, two of whom professed to be limited partners. The trustee claimed the limited partners had become liable as general partners by taking control of the partnership business. The court found after a trial that the partnership kept its funds in two bank accounts, each of which required the signatures of two of the three partners on all checks. The Court of Appeal found it "particularly illuminating" on the issue of control that the two claimed limited partners: (a) had "absolute power" to withdraw all of the partnership funds without the knowledge or consent of the general partner; and (b) could take control of the business from the general partner by refusing to sign checks. Accordingly, the court held the limited partners "clearly took part in the control of the business of the partnership" and thus become liable to the bankruptcy Trustee as general partner. Id.; cf. Plasteel Products Corp. v. Helman, 271 F.2d 354 (1st Cir. 1959).

12. The facts of this case show that individual partners of Astroline Company each had the power to empty all of ACCLP's bank accounts at any time without the knowledge, consent or participation of Ramirez. That Boling, Sostek and the Gibbs brothers were also officers of WHCT Management is of no consequence. The two checks drawn to Astroline Company by Astroline Company partners for "interest" on phantom obligations are alone sufficient to demonstrate control of ACCLP's business by Astroline Company through its partners. Although perhaps not as "illuminating" as the two interest checks, there were other checks signed by Astroline Company partners without the knowledge, consent or participation of Ramirez, including the $100,000 check to Dr. Gene Scott of Faith Center dated March 17, 1988 signed by Boling for which no explanation was forthcoming.

13. The power of Astroline Company, exercised through and by its partners, over the Debtor's bank accounts is sufficient, in and of itself, to conclude that Astroline Company participated in the control of the Debtor's business substantially the same way as a general partner. "Illuminating" as well, however, on the question of control, was the cash control system imposed on the

Debtor by Astroline Company. By continuously maintaining exclusive possession of all checkbooks relating to ACCLP's bank accounts and requiring ACCLP to request that checks be drawn on its own account, Astroline Company, like the limited partners in Holzman could, by refusing to produce checks to pay bills, take control of the business from Ramirez and ..."thus limit his activities in the management of the business." Holzman v. DeEscamilla, 195 P.2d at 834.

14. Defendants have argued that Astroline Company's actions were within the so-called "safe harbors" of Section 19(b) of the MULPA. Further, citing Gast v. Petsinger, 323 A.2d 371, 375 (Pa. Super. Ct. 1974) and Mount Vernon Sav. & Loan v. Partridge Assocs., 679 F. Supp. 522, 528 (D.Md 1987), they claim that in order to be liable as a general partner, a limited partner must exercise "unchecked decision-making authority" and "at least an equal voice in making partnership decisions". The pervasive control of the cash and financial operations of the Debtor exercised by Astroline Company goes far beyond mere "consulting" and "advising" protected by the statutory safe harbors. Moreover, sufficient evidence was offered to demonstrate that, especially

on financial matters, Astroline Company's decision-making was unchecked and Ramirez had no ability in fact to nullify any act taken by Astroline Company.

15. Astroline Company participated in the control of the Debtor in substantially the same way as a general partner and therefore, it, its partners, and Astroline Company, Inc., its successor, are jointly and severally liable to the Trustee for the deficiency under Section 723 of the Bankruptcy Code.

PLAINTIFF,
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CERTIFICATION

THIS IS TO CERTIFY that a copy of the foregoing was hand-delivered, this date, to:

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